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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-553

NOLAN D. NEGAARD and PALMDALE HOMEOWNERS ASSOCIATION,

Petitioners,

vs.

DEPARTMENT OF AERONAUTICS OF THE STATE OF CALIFORNIA and THE CITY OF LOS ANGELES,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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DEPARTMENT OF AERONAUTICS OF THE STATE OF CALIFORNIA and THE CITY OF LOS ANGELES,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioners respectfully pray for a writ of certiorari to review the judgment of the Court of Appeal for the State of California, Second Appellate District, affirming a state trial court's dismissal of a petition to review California's creation of the Palmdale Intercontinental Airport (to be the world's largest—by far), on the sole ground that review was allegedly sought beyond the time allowed by state rules.

Opinion Below.

The opinion of the Court of Appeal is reported in 32 Cal.App.3d 92, 107 Cal.Rptr. 920, and appears as Appendix A. The minute order of the trial court was unpublished and without opinion; a copy is incorporated as Appendix B. The Supreme Court of California denied hearing without opinion or comment.

Jurisdiction.

The decision of the Court of Appeal was filed May 4, 1973. A timely petition for hearing was filed with the California Supreme Court, the highest state court in which decision could be had; that court's order refusing to review the decision of the Court of Appeal was filed June 28, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

Question Presented.

Whether, consistently with the supremacy clause, a state may require that any judicial review of state implementation of and compliance with the determinations and decisions of the Federal Aviation Administration ("FAA") be initiated before the FAA has made those determinations. (This question involves a necessary corollary of this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, No. 71-1637 .... U.S. ...., 36 L.Ed.2d 547, 93 S.Ct. 1854 [hereafter "City of Burbank"] rendered during pendency of the state appeal.)

Statutes Involved.

Acts of Congress involved are the following sections of the Federal Aviation Act: 49 U.S.C. §§1348(a) (b) (c), 1349, 1350 and 1353(a). California statutes involved are: Government Code §11523, Code of Civil Procedure §1094.5 (a) through (e); Public Utilities Code §§21665 and 21666 (as the latter existed at the times material hereto; they have since been amended in particulars which do not affect this litigation).

In view of their bulk, these are set forth in full in Appendix C hereto.

Statement of the Case.

Since the state trial court dismissed by sustaining a general demurrer, which admits all allegations of the pleading, there is no contested issue of fact.

Petitioners and a local school district challenged the proposed establishment and site location of the Palmdale Intercontinental Airport, which the City of Los Angeles ("City") proposed to construct and operate in an area affecting their homes and community. The State Department of Aeronautics ("Department"), which is charged by state law to "cooperate" with the FAA and to determine the propriety of airports to be built within California, conducted an administrative inquiry into the City's proposal and, on August 4, 1969, rendered its decision in form approving the airport site. (Among other things, the decision predicted that the environmental consequences of the proposed airport would probably be ameliorated by technological developments of unknown nature which the Department hopes will occur in future decades.)

Although the Department's decision was to approve an airport of that name, it was approved for a different site, to be selected later, somewhere no less than 2,000 feet north and 4,000 feet east of that involved in the administrative proceeding, which relocated site would become adopted by the Department only upon approval by the Director of the FAA. The Secretary of Transportation, acting for the FAA, granted such approval on June 2, 1970.[1] Theretofore, on October 6, 1969,

[1]Certain subsequent developments regarding that approval occurred but are not material to the subject matter of this litigation. Specifically, it appears that the apparently-final FAA approval was thereafter vacated but petitioners did not and do not rely upon that vacation nor did it figure in the state court decisions.

petitioners had initiated this petition for judicial review of the administrative decision and the procedures employed in reaching it.

Respondents City and Department declined to answer on the merits, instead challenging the timeliness of petitioners' commencement of judicial action on the ground that the Department's order became final September 3, 1969; it was contended, therefore, that judicial review could be sought under California Government Code §11523 no later than September 3, 1969 —nine months *before* the FAA had acted to grant the approval upon which the state decision was conditioned. The trial court premised its decision exclusively on this contention.

Petitioners appealed, contending in material part[2] that their petition for judicial review was timely, in that it was initiated clearly within the time allowed by state law for review after the federal action had been taken, energizing the tentative state decision. The California Court of Appeal held that, since state law allows administrative decisions to be conditional, it would create "a nightmare in federalism" to await the time when "the FAA has had its last relevant say with respect to matters within federal jurisdiction" before adjudicating the state implementation of that relevant determination.

On petition to the California Supreme Court, petitioners, relying upon *City of Burbank v. Lockheed Air Terminal, Inc., supra,* contended that such a burden of challenging state implementation of a federal decision before the federal decision is made would be

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[2]Other attacks made by them involved questions only of state law and therefore are not involved in this petition.

an intolerable interference with and burden upon exercise of that federal power and its enjoyment by the citizens of the several states. Hearing was denied.

Reason for Granting the Writ.

The question presented by this petition is deceptively (and dangerously) simple. To phrase it is to suggest irresistibly the proper answer: Of course, the state should not be able to require its citizens to seek review of the state implementation of a federal agency determination before that indispensable, threshold determination has even been made.

I.

A Judicial Interpretation Which Allows States to Discriminate Against Citizen Activities Under the Jurisdiction of a Federal Agency Creates a Device for Interfering With or Burdening the Federal Power.

The danger in that simplicity is the likelihood of seeming so pedestrian there is no reason for this Court's intervention. The problem is that the very simplicity of the weapon which this rationale puts in the hands of state authorities makes it a perfectly effective way for a state to subvert the paramount power of Congress—reiterated by this Court during the time this case was pending—in this field.

Phrased simply, the rationale below compels citizens of any state to surrender all access to the state's judicial machinery involving airport and aviation matters, by giving state administrative agencies carte blanche to do what they will after a federal decision has been made. Admittedly, there will be many cases within the FAA's sphere in which the existence or non-existence of state

judicial review of local implementation of the FAA's acts will be unimportant; obviously, there will be no need for review of the state reaction to the FAA's rulings in most cases.

On the other hand, however, it can hardly be said that the act of penalizing the citizens of a state because the FAA has jurisdiction does not constitute a substantial, and therefore intolerable, burden on the enjoyment of federal supremacy. Denial of meaningful access to the courts is a stiff price to pay for the citizens' share in the nationwide benefits of federal control of the airlanes. It is also incompatible with a mature, American sense of fair play and honest dealing between the states and their citizens, a tradition which is supposed to run in both directions.

The intolerable nature of the rationale of this case can also be observed in some of its other ramifications. For example, there is the invidious discrimination aspect. A person challenging a purely state determination may, of course, wait until that determination is final before seeking its review. The concept at bench is that a person seeking review of a determination which has a federal-power threshold, however, must act long before that threshold is reached. It is simply inconsistent with the notion of federal supremacy to divide citizens into two categories—those dealing with federal questions, and those dealing with purely local ones—and to impose burdens on the federally related activity which do not apply to citizens acting in only state context.

The test is not whether a state statute, as interpreted by its judiciary, is *intended* to interfere with the federal purpose, or has as its overt and avowed objective that

end; rather, the doctrine of supremacy requires an analysis as to whether the objective effect of such state action constitutes any obstacle to the operation of the federal purpose (*Perez v. Campbell* (1971) 402 U.S. 637, 649, 29 L.Ed.2d 233, 91 S.Ct. 1704, and authorities collected). The existence of another state motive other than frustration is, of course, irrelevant (402 U.S. at 651-652; cf., *Takahashi v. Fish and Game Commission* (1948) 334 U.S. 410, 415-419, 92 L.Ed. 1478, 68 S.Ct. 1138).

A perfect analogy to the situation presented here would be a California statute (or judicial interpretation thereof) which gave the benefits of pretrial discovery procedures to all litigants in California courts except those seeking to enforce claims under the Federal Employers' Liability Act or the Jones Act. The vice thereof is self-evident.

Also, it might be noted that the California statute involved did not *necessarily* compel this imposition of unique burdens on the examination of matters within the FAA's purview; the state statute could easily have been interpreted as urged by petitioners in the state courts, to avoid this constitutional clash. However, it was not so interpreted by the state's courts, and an attempted displacement of the federal authority by the state judiciary is just as invalid as such an attempt by a state's legislature (*Sperry v. Florida* (1963) 373 U.S. 379, 403, 10 L.Ed.2d 428, 83 S.Ct. 1322).

II.

Any State Rule Which Has the Consequence of Frustrating the Purposes of the Federal Aviation Act, in Operation, Violates the Decision of This Court in City of Burbank.

When the decision of the California courts in the present case is examined against this Court's decision in *City of Burbank, supra,* its impact on federal-state relationships, and resultant constitutional infirmity simplifies itself to this net effect:

> If California wishes to build the Palmdale Intercontinental Airport, it must do so in strict conformity with the site selection and other requirements prescribed by the Federal Aviation Administration. Those may or may not be similar to ones envisioned by the state's administrative agencies, but once they are prescribed by the FAA the state's only option is to decide whether to comply with the FAA decision or abandon the project.
>
> Nevertheless, a citizen of California, who in any other circumstance would be entitled to judicial review of the final result of the planning process, must act before the matter has even come to the attention of the FAA. Therefore, California citizens are, by operation of the federal agency, barred from access to California courts long before the matter to be adjudicated has become more than an inchoate possibility.

There is nothing in any Act of Congress, federal regulation or decision of this Court which either compels or permits this signing-away of the rights of Californians to otherwise-universally-available access to their courts. The only thing which produces that forfei-

ture upon Californians as a price of federal supremacy in the field of aviation is the California courts' curious interpretation of the California statutes involved. If any body has the power to impose such a penalty for entering the federal domain, it would be Congress alone. Either a state statute or (as here) judicial interpretation which creates it violates the supremacy clause.

The teaching of *City of Burbank* is that Congress has properly vested in the FAA absolute and unqualified power to determine the "what", "where", "why" and "how" of airports. Only after that federal power has been fully exercised does any non-federal sphere of decision come into being. That does not mean, however, that the state function is trivial. It is still an important one, namely, to answer the one remaining question: "whether" the state wants the airport as federally designated.[3]

To illustrate, one might hypothesize a decision by aeronautical authorities of Virginia to establish a new intercontinental terminal to serve the combined air travel needs of metropolitan Richmond, the Peninsula and Norfolk in 1984 and after. The initial, tentative decision of the state authorities would call into play a strictly federal determination under *City of Burbank*. If, however, the decision of the FAA were to place

[3]As mentioned in the statement of the case, the California administrative decision was tentative in a good many additional ways, also. Notable among these is the provision that the airport will eventually be constructed some 2,000 feet north and 4,000 feet east of the one which everybody examined in the administrative proceeding. To illustrate the magnitude of that change, a similar relocation of Washington National Airport would put it somewhere in the heart of Georgetown. Despite the pooh-poohing by the state court of appeal, changes of that magnitude can be a matter of significance in ascertaining what is being reviewed—which, of course, bears on the question of when it should be reviewed.

that monstrous project in Williamsburg, totally wiping out that historical shrine, the people of Virginia might deem themselves entitled, under the reserved powers provisions of the Tenth Amendment, to decide whether or not they wanted to pass up the opportunity. In other words, if a state or other governmental body wants to build an airport, it undoubtedly must do so where and in the manner the FAA prescribes. But that is a far cry from saying that the FAA can compel the building of an airport at the place and in the way it prescribes. The state retains the right to determine that it would just as soon not build an airport, because the price of meeting the FAA standards is too high.[4]

The anomaly of the decision below is that it inverts the process. It compels the people of a state (if not its bureaucrats) to make the decision on whether they want the FAA-prescribed airport before the FAA has formulated the prescription. Under *City of Burbank*, the state must wait until it finds out the nature of the FAA's blueprint before it decides whether it will build or not; under *Negaard* (the present case) the state requires its citizens to write their bureaucrats a blank check by approving the blueprint before it is started.

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[4]Using the word "price" primarily in a non-monetary sense, such as that of determining whether the destruction of a natural or historical treasure or disruption of a community is worth the benefits to be gleaned from a modernized airport system, a process of balancing to determine whether the game is worth the candle. Nevertheless, monetary considerations might also be envisioned; it might simply cost too much money to build what the FAA wants, in which case (so far as petitioners know) that federal agency has no power of taxation over the states.

That is not merely an exercise in illogic (in which event the result, however regrettable, would not be one for scrutiny by this Court). Instead, it is a subversion of the operation and goal of the Federal Aviation Act and similar acts of Congress and subsidiary regulations, and that *is* a matter for this Court.

Federalism, after all, is not a conflict of princes, nor even a battle of bureaucracies. It is the staking out of lines of division between the sovereignty of the people of the United States, as a whole, and the sovereignty of the people of a particular state, specifically. It would be cruel perversion of the beneficient principle of federalism to hold that the people of any state must —as a condition to their enjoyment of the benefits of United States citizenship—surrender their role of self-government in the affairs of their state. More particularly, a ruling that the penalty for enjoying federal supremacy over aviation is antecedent surrender of state-law rights to judicial review of administrative action would transgress the guarantees against abridgement of privileges and immunities of citizenship and, quite possibly, the little used but significant constitutional guarantee of a republican form of government for each state.

In the last analysis, the graphic phraseology of the California court is the best refutation of its own holding. The "nightmare of federalism" is far more certainly engendered by refusing to wait for "the last relevant say" on the subject matter Congress has entrusted to the FAA than it is by judicial interpretations which

compel the citizens (and the courts) of a state to go through the conceptually sophistic gymnastics of seeking judicial review of the effects of that say before it is uttered. The proposition advanced here is not only engagingly simple; it is also far preferable:

> Where Congress (according to this Court) has vested a federal agency with absolute dominion over decision-making in a particular subject matter, whatever remedies a state may provide for review of the effects of that decision-making must follow, not precede, the federal determination which causes those effects.

Any other approach would be a nightmare in many respects—including those of federalism. It would also provide an avenue to subtle and sophisticated—but no less effective—nullification by state procedural rule-making of the substance of *City of Burbank* and the Federal Aviation Act.

Conclusion.

For these reasons a writ of certiorari should issue to review the judgment and that portion of the opinion of the California Court of Appeal which establishes a California requirement that litigants must seek review of matters within the jurisdiction of federal agencies before those agencies have acted.

Respectfully submitted,

EDWARD L. LASCHER,
Attorney for Petitioners.

APPENDIX A.

Opinion of the Court of Appeal.

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Nolan D. Negaard and Palmdale Homeowners Association, Plaintiffs and Appellants, vs. The Department of Aeronautics of the State of California, and the City of Los Angeles, a Municipal Corporation, Defendants and Respondents. 2nd Civil No. 38873, S.Ct. No. 962 512.

Filed: May 4, 1973.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Wenke, Judge. Affirmed.

Lascher & Rader, Edward L. Lascher and Richard E. Rader, for Plaintiffs and Appellants.

Evelle J. Younger, Attorney General; Daniel J. Weston, Deputy Attorney General, for Defendant and Respondent The Department of Aeronautics of the State of California.

Roger Arnebergh, City Attorney; Milton N. Sherman, Assistant City Attorney; John F. Haggerty, Deputy City Attorney, for Defendant and Respondent, The City of Los Angeles.

On October 31, 1968, the City of Los Angeles ("City") filed an application with the California Department of Aeronautics ("Department") for site approval of its proposed Palmdale International Airport. Pursuant to section 21665 of the Public Utilities Code hearings on the application were conducted by a hear-

ing officer on March 10, April 29 and April 30, 1969, at Palmdale.

On July 28, 1969, the hearing officer issued a proposed decision, granting approval of the application, subject to certain conditions. On August 4, 1969, the Department adopted the proposed decision as its final decision, and expressly made it effective as of that date. Copies of the decision were mailed to the parties on August 5, 1969.

On October 6, 1969, Noland D. Negaard, and the Palmdale Homeowners Association, appellants, filed a proceeding in the superior court, described as a "Petition for Writ of Mandamus (C.C.P. sec. 1094.5)." It sought to set aside the decision of the Department. The City and the Department demurred, alleging, among other things, that the petition was barred by the applicable statute of limitations. The demurrers were sustained with leave to plead "any facts showing tolling, estoppel, or waiver [of the statute.]" Appellants amended their petition, the City and the Department again demurred, and the demurrers were sustained without leave to amend on the ground that the action was barred. It was dismissed on March 29, 1971. Appellants appeal.

There can be no rational dispute with respect to the date on which—appellants' arguments aside—the applicable statute of limitations expired. It was September 3, 1969 (Gov. Code § 11523), the Department having made its decision effective as of August 4, which it had the power to do. (Gov. Code §§ 11519, 11521; *Eichman v. Escondido Etc. Sch. Dist.*, 61 Cal.2d 100, 102; cf. *Cameron v. Cozens*, 30 Cal. App.3d 887, 891, fn.3.) *Walters v. Contractor's State*

License Board, 229 Cal.App.2d 449, gingerly cited by appellants, was abandoned by its collective creator in *Riemel v. House*, 264 Cal.App.2d 173, 175.

Appellants' arguments that section 11523 of the Government Code presents no bar to the maintenance of this proceeding fall into three categories: 1. the Department's decision did not really become final on August 4, 1969, but at some unknown date thereafter; 2. the Department's decision was totally void and subject to attack at any time; and 3. respondents are estopped to rely on any applicable period of limitations.

None of these approaches has any merit. We discuss them in order.

I.

The argument that the order of August 4, 1973, [sic], only had a "veneer of finality," but was really interlocutory in nature, springs from the fact that the site approval was conditional on relocating the two major runways on the proposed airport, and approval of air traffic patterns and of the zone of approach by the F.A.A.

Section 21666 of the Public Utilities Code specifically provided that site approvals may be granted "subject to any reasonable conditions . . . necessary to effectuate the purposes of this article."[1]

If appellants' point has any merit they could, in effect, seek judicial review of the site approval at about the time when the airport becomes operational. The

[1]The decision of the Department was made when section 21666 of the Public Utilities Code, as last amended in 1961 (Stats. 1961, ch. 2071, p. 4324, § 74), was in effect. The section was rewritten in 1969. (Stats. 1969, ch. 138, p. 354, § 257; Stats. 1969, ch. 712, p. 1394, § 7) and amended in 1972 (Stats. 1972, ch. 1308, § 4). The language with respect to conditional site approvals was not changed in any substantial way.

planning, construction and operation of an airport is enough of a nightmare in federalism. (E.g., *Lockheed Air Terminal Inc. v. City of Burbank*, 457 Fed.2d 667, prob. juris. noted, *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 840.) If the finality of state approval for the site can be delayed, as appellants suggest, until the F.A.A. has had its last relevant say with respect to matters within federal jurisdiction, airports simply could not be constructed in this state. In any event, the argument that conditions attached to an administrative order delay its finality has been decisively rejected. (*Ginns v. Savage*, 61 Cal.2d 520, 525.)

II.

The point that the order of August 4, 1969, was totally void rests, basically, on a series of non-equations which go something like this: "error=unfair trial=excess of jurisdiction=lack of jurisdiction=voidness."

Under this rubric appellants present us, in effect, with a string of arguments claiming various errors at the administrative level. The mood is indignation and caustic vigor, based on solid scholarship and an advocate's ability to look at a rather innocuous administrative record as an example of drumhead justice. Just reading appellants' brief one does indeed get the general impression that somewhere along the line error did creep into the record.[2] All the same, the power of an administra-

[2]The image changes after perusal of respondents' briefs. One erroneous concept which clouds appellants' position in some respects is that they view the hearings conducted on behalf of the Department as the precise equivalent of a superior court trial in which they have all the rights of litigants. It is beyond the

tive agency to err without losing jurisdiction does not vary in inverse proportion to counsel's command of hyperbole.

We have carefully reviewed the claimed errors which supposedly were so fundamental that the Department's August 4, 1969, order is really nothing but a piece of scrap paper. We need not decide whether there is merit in any of appellants' points. None can possibly be as basic as claimed.

III.

Appellants claim that their amended petition below "contains specific allegations of conduct by both Department and City which show that it would be most inequitable for either to short-circuit petitioners' right to judicial review by urging the bar of any statute of limitations. . . ."

The grounds for an estoppel pleaded and argued before us may be summarized as follows:

1. The Department concealed a "material and substantial portion" of appellants' grounds for judicial review. Here it is charged that while the Department purported to conduct a hearing on all relevant issues relating to the proposed airport site, it later declined to consider "noise or other environmental aspects." On the advice of the Attorney General it then made

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scope of this opinion to delineate the precise significance of the public hearing in the departmental process leading to the approval of an airport site, but it is obviously something different from a court trial or, indeed, from an administrative hearing of a disciplinary nature. (Cf. *Beverly Hills Fed. S. & L. Assn. v. Superior Court*, 259 Cal.App.2d 306, 320-324.)

its determination without taking such matters into consideration.

2. Appellants allege further that the Department and the City did not disclose to them that after the public hearings they "agreed to a concealed revamping of the proposed airport site, by the further movement of runway locations."[3]

There are several possible answers to the claim of estoppel. One decisive way of handling it would be to hold, as respondents urge we should, that appellants' expectations with respect to the consideration of noise pollution, environmental factors and the location of runways were legally unjustifed in the first place or are, for other reasons, irrelevant. We need not, however, decide these matters. Suffice it to say that nowhere in the amended petition do appellants allege when they became aware of the facts which allegedly estop respondents. (See *Casualty Ins. Co. v. Rees Investment Co.*, 14 Cal.App.3d 716, 719-720.)[4]

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[3]In appellants' opening brief it is alleged that ". . . petitioners did not uncover the deception until several months later when Department was called upon to explain to another agency its precipitous action in approving the application in the face of overpowering evidence that the airport was ill-planned from the standpoint of noise and ecology. . . ." It is not, however, claimed that the discovery came after the filing of the amended petition below. This is of some significance on the issue whether leave to amend further should have been allowed.

[4]According to the application for such permission present counsel did not become involved in this matter until September 3, 1969. Until then the laboring oar on behalf of persons and entities opposing the airport development had been borne by the Palmdale School District. The school district, however, by a three to two vote, elected not to seek judicial review. We are not told whether this decision was made before or after September 3, 1969.

IV.

The only remaining question is whether the superior court abused its discretion in denying further leave to amend the petition. It did not.

For reasons adequately explained by appellants' present counsel, the superior court permitted the initial petition to be filed without prior service.[4] For one reason or another—we need not attempt to assess blame—the first amended petition was not filed until January 5, 1971.

There is no suggestion in the record that any new facts have come to light since January 1971. At that time the matter had been in the hands of an attorney of outstanding ability for about fifteen months. The trial court was well within its discretion when it apparently found it hard to believe that in the first amended petition he had not pleaded his best case.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

Kaus, *P. J.*

We concur:

Thompson, *J.**

Keene, *J.**

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[4]According to the application for such permission present counsel did not become involved in this matter until September 3, 1969. Until then the laboring oar on behalf of persons and entities opposing the airport development had been borne by the Palmdale School District. The school district, however, by a three to two vote, elected not to seek judicial review. We are not told whether this decision was made before or after September 3, 1969.

*Assigned by Chairman of Judicial Council.

APPENDIX B.

Minute Order.

Superior Court of the State of California, for the County of Los Angeles. Dept. 57.

Dated: March 19, 1971.

Robert A. Wenke, Judge.

R. Albrecht, Deputy Clerk.

Nolan D. Negaard and Palmdale Homeowners Association vs. The Department of Aeronautics of the State of California, etc. 962512.

Counsel for Plaintiff: Edward L. Lascher.

Counsel for Defendant: Roger Arnebergh, City Attorney by J. Haggerty, for City of Los Angeles, Evelle J. Younger, Attorney General by D. Weston for Department of Aeronautics.

NATURE OF PROCEEDINGS.

Demurrer of City of Los
Angeles, a municipal
corporation,
to Amended Petition for
Writ of Mandamus
Each demurrer sustained on ground of Statute of Limitations as to both defendants without leave to amend.
Demurrer of respondent
Department of Aeronautics
of the State of California
to Amended Petition for
Writ of Mandamus
Notice waived.

APPENDIX C.

Statutes Involved.

49 U.S.C. §1348(a).

§ 1348. *Airspace control and facilities—Use of airspace*

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

49 U.S.C. §1348(b).

Air navigation facilities

(b) The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

49 U.S.C. §1348(c).

Air traffic rules

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. §1349.

§ *1349. Expenditure of Federal funds for certain airports and air navigation facilities; location of airports, landing areas, and missile and rocket sites*

(a) No Federal funds, other than those expended under this chapter, shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the administrator, under regulations prescribed by him, for such recommendation and certification with respect to any landing area

or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

(b) In order to assure conformity to plans and policies for allocations of airspace by the Administrator under section 1348 of this title, no military airport or landing area, or missile or rocket site shall be acquired, established, or constructed, or any runway layout substantially altered, unless reasonable prior notice thereof is given the Administrator so that he may advise with the appropriate committees of the Congress and other interested agencies as to the effects of such acquisition, establishment, construction, or alteration on the use of airspace by aircraft. In case of a disagreement between the Administrator and the Department of Defense or the National Aeronautics and Space Administration the matter may be appealed to the President for final determination. Pub.L. 85-726, Title III, § 308, Aug. 23, 1958, 72 Stat. 750.

49 U.S.C. §1350.

§ *1350. Establishment or construction of airports and landing areas not involving expenditure of Federal funds*

In order to assure conformity to plans and policies for, and allocations of, airspace by the Administrator under section 1348 of this title, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regula-

tions prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft. Pub.L. 85-726, Title III, § 309, Aug. 23, 1958, 72 Stat. 751.

Library references: Aviation 211; C.J.S. Aerial Navigation § 35 et seq.

49 U.S.C. §1353(a).

§ *1353. Development planning—Use of navigable airspace; location of landing areas, Federal airways, radar installations, and air navigation facilities*

(a) The Administrator is directed to make long range plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of landing areas, Federal airways, radar installations and all other aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense, except for those needs of military agencies which are peculiar to air warfare and primarily of military concern.

California Government Code §11523.

§ *11523. Judicial review*

Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek recon-

sideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him, upon the payment of the fee specified in Section 69950 of the Government Code as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record time within which a petition may be filed shall be extended until * * * *30* days after its delivery to him. The agency may file with the court the original of any document in the record in lieu of a copy thereof.

(Amended by Stats. 1971, c. 984, p. 1896, § 1.)

Code of Civil Procedure §1094.5(a) Through (e).

§ *1094.5.* [*Inquiry into validity of administrative order or decision.*]

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the rec-

ord of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on

the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

Public Utilities Code §21665.

§ *21665. Approval of sites; hearing; notice of application.* On its own motion, the division may, or upon the request of an affected or interested person the division shall, hold a public hearing in connection with the approval of an airport site or the issuance of an airport permit. Before the division grants or denies approval of an airport site or issues an original permit to use or operate an airport, all public service corporations and all persons or corporations engaged in radio or television broadcasting owning facilities in the area involved shall be notified of the application and shall have 15 days after the notice in which to demand a public hearing. (Added Stats. 1953, c. 151, p. 939, § 1, as amended Stats. 1961, c. 2071, p. 4324, § 73.)

Public Utilities Code §21666.

§ *21666. Approval of sites; issuance of permits; requirements; conditions.* The division shall grant approval of an airport site and issue an airport permit, with reasonable dispatch, if it is satisfied that all of the following requirements have been met:

(a) The site is adequate for the proposed airport. Any site shall be deemed adequate which meets or exceeds the minimum airport standards approved or recommended by the federal government.

(b) The proposed airport, if constructed or established, will conform to minimum standards of safety.

(c) Safe air traffic patterns have been worked out for the proposed airport and for all existing airports and approved airport sites in its vicinity.

(d) The zone of approach of the airport has been engineered in conformity with the provisions of Section 21403, and is available for public inspection.

The division may grant approval of a site subject to any reasonable conditions which it deems necessary to effectuate the purposes of this article. (Added Stats. 1953, c. 151, p. 939, § 1, as amended Stats. 1957, c. 1651, p. 3027, § 3; Stats. 1961, c. 2071, p. 4324, § 74.)

SUPREME COURT, U.S.
FILED
OCT 25 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-553

NOLAN D. NEGAARD and PALMDALE HOMEOWNERS ASSOCIATION,

Petitioners,

vs.

DEPARTMENT OF AERONAUTICS OF THE STATE OF CALIFORNIA and THE CITY OF LOS ANGELES,

Respondents.

Answer of Respondent, City of Los Angeles, to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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NOLAN D. NEGAARD and PALMDALE HOMEOWNERS ASSOCIATION,

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vs.

DEPARTMENT OF AERONAUTICS OF THE STATE OF CALIFORNIA and THE CITY OF LOS ANGELES,

Respondents.

Answer of Respondent, City of Los Angeles, to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Respondent, City of Los Angeles, hereby answers Petitioners' Petition for Writ of Certiorari and prays that said Petition be denied.

Statutes Involved.

In addition to the statutes listed by Petitioners on page 2 of the Petition (hereinafter referred to as "P" for citation purposes) there is *California Public Utilities Code,* Section 21663. Other pertinent code sections are 4 *California Administrative Code,* Section 3531 and 4 *California Administrative Code,* Section 3535. These are set forth in full in Appendix A hereto and judicial notice of such are hereby requested.

Statement of the Case.

The City of Los Angeles (hereinafter referrred to as "City") plans to construct and operate the Palmdale Intercontinental Airport (hereinafter referred to as "Airport") in the Antelope Valley, which is in the north part of Los Angeles County.

In order to operate an airport in California, state law requires that the airport operator have an airport permit (*Public Utilities Code*, Section 21663) (see Appendix A). The California State Aeronautic's Act gives the State Department of Aeronautics (hereinafter referred to as "Department") the power to issue said permits (*Public Utilities Code*, Section 21666) (see "P"—Appendix C, p. 15). The Department also has the power to grant site approvals and said grant can be subject to conditions imposed thereon (*Public Utilities Code*, Section 21666).

The site approval permit is the initial grant by the Department. It allows for the development of the airport. An airport permit is issued upon completion of the airport in accordance with terms of the site approval permit (4 *Cal. Admin. Code* 3531(c)) (see Appendix A). If the conditions specified on the site approval permit have been met, the airport permit shall be issued allowing the airport to be opened for operation (*Cal. Admin. Code* 3535(a)). Any affected or interested person may request, and the Department shall hold upon such request, a public hearing in connection with the issuance of an airport permit (*Public Utilities Code*, Section 21665) (see "P"—Appendix C, p. 15).

The airport permit is only to be issued upon the conditions imposed on the granting of site approval

being met and petitioners, if affected, or any interested parties, are entitled to a public hearing to determine if such conditions have been met (*Public Utilities Code*, Section 21665). If the airport permit is then granted, the operator must comply with the conditions imposed by the Department (*Public Utilities Code*, Section 21-668).

City applied for site approval for the Airport which approval was granted by the Department. No airport permit has been applied for, as of yet, by City and, consequently, none has been granted. The decision granting site approval was effective August 4, 1969, (see "P"—Appendix A, p. 2) and the Petitioners then had 30 days, or until September 3, 1969, to seek judicial review of the administrative decision pursuant to *California Government Code*, Section 11523 (see "P"—Appendix C, p. 12). Review was sought by Petitioners pursuant to *California Code of Civil Procedure*, Section 1094.5 (see "P"—Appendix C, p. 13). Petitioners did not seek review until October 6, 1969, when they filed their "Petition for Writ of Mandamus" (C.C.P. see 1094.5) (see "P"—Appendix A, p. 2) in the Los Angeles County Superior Court. Respondent City and Department demurred to the State Petition for Writ of Mandamus on the ground, among others, that the State Petition was barred by the applicable statute of limitations, namely, *California Government Code*, Section 11523. The demurrers were sustained with leave to amend. The State Petition was amended and demurrers, filed to it, were sustained by the trial court without leave to amend. The California Court of Appeal affirmed the trial court and the California State Supreme Court denied a petition for hearing.

I.

The California Act Authorizing the Granting of Airport Site Approval Provides That Conditions May Be Attached to Such a Grant.

The site approval was granted subject to three conditions, namely:

1. Relocation of the two parallel sets of the long runways at least 2,000 feet north and at least 4,000 feet east of the location appearing on the application.

2. Approval of safe air traffic patterns by the Federal Aviation Administration.

3. Approval of the zone of approach of the airport by the Federal Aviation Administration.

(See Findings of Fact and Order of Department's Hearing Examiner, which were adapted by Department, attached hereto as Appendix B).

It should be noted that one of the conditions allowed for the relocation of two runways at least 2,000 feet north and 4,000 feet east of the location appearing on the application. This condition did not provide, as Petitioners contend ("P" p. 3, 9 ftn.), that the site itself was to be relocated. Petitioners, on page 9, analogize to Washington National Airport being relocated. The analogy is not exactly appropriate since, as stated, the site approval did not allow for the relocation of the site, but for the runways, and, secondly, the Airport is to be constructed on 17,000 acres of virtually undeveloped desert land, an area in no way comparable to the Washington, D.C., metropolitan area. The weakness

and inaccuracy of this analogy is evidence of the weakness of Petitioners' case. Petitioners' hyperbolical approach was noted by the California Court of Appeals (see "P"—Appendix A, p. 4).

Section 21666 of the *California Public Utilities Code* states in its concluding paragraph (see "P"—Appendix C, p. 16) that the Department (referred to as "division" in the section) "may grant approval of a site subject to any reasonable conditions which it deems necessary to effectuate the purpose of this article."

The conditions stated by the Department's decision were reasonable considering the Federal Government's predominance in the area of air navigation. The California State Aeronautics act, of which *California Public Utilities Code*, Section 21666 is a part, recognizes this.

Section 21240 of the *California Public Utilities Code* (also part of the California State Aeronautics Act) reads:

> "This state recognizes the authority of the Federal Government to regulate the operation of aircraft and *to control the use of the airways, and nothing in this act shall be construed to give the Department of Aeronautics the power to so regulate* and control safety factors in the operation of aircraft or *to control use of the airways." Public Utilities Code*, Section 21240 (emphasis added).

II.

Whether a State Action Was Timely Filed, Pursuant to a State Statute of Limitations, Challenging the Decision of a State Agency, Does Not Present a Federal Question.

Petitioners contend that the state courts ruling frustrated the Federal Aviation Act ("P", p. 8). It is not clear in reading the Petition just how this occurred. It would appear that the Petitioners are straining to present a federal question so as to come within Rule 19(a) of the United States Supreme Court Rules. But just what relief did the Petitioners seek in the state court and what was the nature of the state court's ruling?

Petitioners sought review, by way of a Writ of Mandamus, pursuant to *California Code of Civil Procedure,* Section 1094.5, of the Department's decision granting airport site approval. (see "P"—Appendix A, p. 2). The State Petition was filed by Petitioners nine months before the alleged FAA approval of the runway relocation, the State Petition being filed October 6, 1969 and that particular alleged FAA approval being June 2, 1970 ("P" pp. 3-4). The State Petition was directed against the action and proceeding of the Department. The questions that may be raised by a State Petition for Writ of Mandamus, pursuant to *California Code of Civil Procedure,* Section 1094.5, are whether the Department, as the body who rendered the decision, proceeded without, or in excess of jurisdiction, whether it provided a fair trial or whether there was an abuse of discretion by the Department in some way in its conduct of the proceeding. (see "P"—Appendix C, pp. 13-14). *California Code of Civil Procedure,* Section

1094.5, provides for an attack on the agency rendering the decision. The State Petition was not filed against the Federal Aviation Administration the body who was to approve safe air traffic patterns and the zone of approach. The Department was not going to approve these, nor was it going to further approve, for the purpose of the site approval, the relocation of the runways. The Department's decision was effective August 4, 1969. If Petitioners wanted to attack that decision they had, pursuant to state law, namely, *Government Code,* Section 11523, 30 days to do so which they failed to do.

Accepting Petitioners' argument one could wait until the Federal Aviation Administration had its last say before they need challenge the site approval. This would result in uncertainty in the status of site approvals. Such a rule would be unfair to the recipient of site approval. The California court pointed out the absurdity of this position (see "P"—Appendix A, p. 4). Conversely, Petitioners' argument would mean that the Department's decision could not be challenged until the conditions occurred because, according to Petitioners, not until then is the Department's decision final. It may be years before such Federal approvals are forthcoming. Such a rule, therefore, would also be unfair to those who wished to challenge the site approval. Petitioners allege that the relocation of the runways (they claim the site) was approved June 2, 1970. That is the only condition of the Department's order referred to to make it, it is submitted, appear that it would be reasonable to require one who wishes to challenge the decision wait until the condition occurs. Yet, as pointed out, there were two other conditions which were also imposed which may not have yet oc-

curred. Petitioners conveniently choose to ignore the existence of these additional conditions.

The Petitioners would have the Federal approvals challenged in the state proceedings reviewing the Department's action. But what authority does Petitioners' offer to show that the state courts, in their review of a state agency's action, have the power to set aside, or rule invalid, Federal approvals. In fact, if anything, that, especially in the area of air navigation, would appear to be a violation of the supremacy clause.

The state courts, in interpreting the particular state statute of limitations, ruled that the Petitioners had not timely filed their action to challenge the decision of a state agency. This does not present a federal question. The state courts were not saying that review of the Federal approvals could not be sought by whatever appropriate Federal procedure is available for such. They did say that if you are going to challenge a state agency's action you must do so within the time prescribed by state law.

The City in developing the Airport is bound by the conditions of the Department's decision. The state airport permit would only be issued by the Department to the City if the conditions have been met [4 *California Administrative Code,* Section 3535(a)]. On page 9 of the Petition, Petitioners talk about the FAA being able to compel the building of airports. There is no support for such a statement. Even though the City has received site approval there is no rule which compels it to build the airport.

III.

The Judicial Interpretation Did Not Discriminate Against the Petitioners Since the Department's Decision Was Final.

Petitioners contend that the state court's ruling was discriminatory because it allegedly laid down some different rule when federal activity was involved ("P"—p. 6).

The Department's decision was a final order approving the site for construction of the Airport with certain conditions having to be met before an airport permit would be granted for the operational use of the airport. The rule that conditions can be attached to a final state administrative order, is state law and not limited to administrative orders where Federal activity is involved. The Court of Appeals cited the case of *Ginns v. Savage*, 61 Cal.2d 520, 525 in support of the rule ("P"—Appendix A, p. 2). That case involved a real estate license.

Conclusion.

For these reasons the writ of certiorari should be denied.

Respectfully submitted,

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By JOHN F. HAGGERTY,
Assistant City Attorney,
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APPENDIX A.

Additional Statutes Involved.

California Public Utilities Code, Sec. 21663.

§21663. *Operation of airport without permit.*

It is unlawful for any political subdivision, any of its officers of employees, or any person to operate an airport unless an appropriate airport permit required by rule of the department has been issued by the department and has not subsequently been revoked.

California Administrative Code, Sec. 3531.

3531. *Site Approval Requirements. (a) Issuance of Site Approval:* The issuance of site approvals by the Department is contingent upon applicant's meeting the requirements of these regulations and obtaining approvals required by other governmental agencies having jurisdiction. The principal items requiring approval clearance or approval are:

(1) Land use approval of local governing body.

(2) Airspace approval by Federal Aviation Administration.

(3) Favorable response to required public notice or resolution of any potential conflict between the proposed airport and other facilities in the area.

(4) Investigation, inspection and clearance by designated representative of the Department.

(5) The advantages to the public in selection of the site outweigh the disadvantages to the environment. Environmental considerations include but are not limited to noise.

(6) The site is adequate for the proposed airport. Any site shall be deemed adequate which meets or exceeds the minimum airport standards approved or recommended by the Federal Government.

(7) The proposed airport, if constructed or established, will conform to minimum standards of safety.

(8) Safe air traffic patterns have been worked out for the proposed airport and for all existing airports and approved airport sites in its vicinity.

(9) The zone of approach of the airport has been engineered in conformity with the provisions of the Public Utilities Code, Section 21403, and is available for public inspection.

(b) The Department may grant approval of a site subject to any reasonable conditions which it deems necessary to effectuate the purposes of these regulations.

(c) Site approvals will be issued for an effective period of one (1) year. Extensions of time will be granted upon application when justified. Site approvals are issued without charge. An airport permit will be issued upon completion of the airport in accordance with terms of the site approval. See Section 3535 below.

California Administrative Code, Sec. 3535.

3535. *Permits. (a) Issuance of Permits:* An airport permit will be issued upon completion of the airport for which site approval has been granted. The proponent shall notify the Department of such completion and request a permit authorizing the airport to be opened for operations. The Department shall inspect

the airport to insure that conditions specified on the site approval have been met. Upon completion of the inspection, if all the conditions have been met, the permit shall be issued.

(b) Terms of Issuance: Airport permits shall be issued by the Department without charge. The permit shall continue in effect so long as the airport meets the conditions set forth on the original site approval and on the permit, and is subject to revocation only under conditions set forth in Article 4 of this regulation. The conditions under which site approvals and permits are issued will be listed on the back of the site approvals and permits when issued.

(c) Changes in Conditions: When there are changes in the use of the airport or changes in the class of the airport, an Amended Site Approval is required. When changes are made which affect conditions which have been imposed upon operation of the airport, an Amended Site Approval is required to remove the conditions or alter them. An application to the Department for an Amended Site Approval must be initiated by the airport when one is required.

(d) Annual Report Required: In order that the Department may maintain accurate records of the physical status of all permitted airports, an annual report will be required on forms prescribed by the Department. The Department will mail forms to all airports in the State (except military) in January of each year. Forms shall be completed and returned to the Department within 30 days.

APPENDIX B.

Findings of Fact and Order of Hearing Officer.

Pursuant to the foregoing findings of fact, the Hearing Officer makes the following determination of issues:

I

The site is adequate for the proposed airport.

II

The proposed airport, if constructed or established, will conform to minimum standards of safety.

III

Safe air traffic patterns can be worked out for the proposed airport and for all existing airports and approved airport sites in its vicinity and subject to approval of air traffic patterns as safe by the Federal Aviation administration this issue is answered in the affirmative.

IV

Provided the zone of approach of the airport is engineered in conformity with the provisions of Section 21403 of the Public Utilities Code and is available for public inspection which requires conformity with the specifications of Part 77 of the Federal Aviation Regulations of the Federal Aviation Administration, Department of Transportation, this issue is answered in the affirmative.

* * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The application of respondent City of Los Angeles for site approval of its proposed Palmdale International Airport is hereby granted, subject to the following conditions:

1. Relocation of the two parallel sets of the long runways at least 2000 feet north and at least 4000 feet east of the location appearing on the application.

2. Approval of safe air traffic patterns by the Federal Aviation Administration.

3. Approval of the zone of approach of the airport by the Federal Aviation Administration.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as a result of the hearing had before me on the above dates, at Palmdale, California, and recommend its adoption as the decision of the Department of Aeronautics.

DATED: July 28, 1969

/s/ George K. Bellows
GEORGE K. BELLOWS, Hearing Officer